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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESS HERNANDEZ,

Defendant and Appellant.

H034062

(Santa Clara County
Super. Ct. No. CC647651)

After the trial court found that defendant Jess Hernandez had violated his probation, the court revoked defendant's probation and sentenced him to three years in prison with 415 days custody credits. Defendant appeals, contending that the court failed to give him written notice of the alleged probation violations, and failed to provide a written order as to the evidence it relied upon and the specific reasons for revoking his probation; that the evidence does not support a finding that he volitionally failed to comply with the terms of his probation; and that the court erred by admitting documents containing multiple layers of hearsay, which rendered the documents unreliable. We disagree with all these contentions and, therefore, will affirm the judgment.

BACKGROUND

On September 15, 2006, Natalie Anaya received a call from defendant, her boyfriend, who apologized for having hit her in the face two days before. Anaya had

received a black eye from that incident. Defendant asked to meet Anaya and they agreed to meet near defendant's home at 10:30 p.m. When Anaya arrived and approached defendant, defendant's 17-year-old sister surprised her from the side, punched her in the head and face at least three times, and grabbed her to keep her from getting away. Defendant then punched Anaya once in the face. Anaya fell to the ground and defendant's sister continued to punch her. Defendant laughed and said that Anaya got what she deserved. Anaya drove home and called the police. She became dizzy and was vomiting, so she was transported to the hospital by ambulance. She was treated at the hospital for a broken nose, additional injuries to her mouth and forehead, and bruising on her right shoulder and left upper arm.¹

Defendant was charged by felony complaint with assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) On April 13, 2007, defendant entered a negotiated nolo contendere plea on condition that he not be sentenced to state prison. On June 1, 2007, the court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions. Conditions of probation included the performance of 20 hours of community service, the completion of a certified domestic violence program, the prohibition of possession or consumption of alcohol or illegal drugs, the submission to chemical tests as directed by the probation department, and the completion of a substance abuse treatment program at the direction of the probation department.

On August 30, 2007, the probation officer reported that on August 2, 2007, defendant committed battery against a new victim, and that on August 14, 2007, defendant had been instructed to enroll in a substance abuse treatment program. Defendant had not enrolled in a domestic violence treatment program or completed

¹ The facts are taken from the probation report.

20 hours of volunteer work. Following a hearing, the court continued defendant on probation on the original terms and conditions.

On October 25, 2007, the probation officer reported that on September 20, 2007, defendant enrolled in and began participating in a substance abuse treatment program. On September 24, 2007, he had a diluted urine test result. He had not enrolled in a domestic violence program or completed 20 hours of volunteer work. Following a hearing, the court continued defendant on probation on the original terms and conditions.

On March 27, 2008, the probation officer reported that on December 7, 2007, defendant was instructed to enroll in a domestic violence program and to commence his volunteer work. On February 6, 2008, he reportedly completed a substance abuse treatment program. He failed to report for an office visit on February 26, 2008, and he had a second diluted urine test result on March 4, 2008. Following a hearing, the court continued defendant on probation on the original terms and conditions.

On May 29, 2008, the probation officer reported that defendant provided a third diluted urine sample on March 18, 2008. He failed to provide proof of completion of his substance abuse treatment program. As of March 26, 2008, he had attended seven sessions of a domestic violence program and had two absences. He committed a battery on a new girlfriend on April 10, 2008, and he had not completed 20 hours of volunteer work. The court summarily revoked defendant's probation and remanded him into custody. At the probation revocation hearing on June 26, 2008, defendant admitted violating his probation. The court reinstated probation with modified terms and conditions. Defendant was to serve 120 days in county jail. He had 43 days custody credits and the balance of the term could be served in a residential substance abuse treatment program.

On August 28, 2008, the probation officer reported that on July 10, 2008, defendant was transported from custody to a residential substance abuse treatment program. He completed the program on August 18, 2008, and was referred to a

transitional program. He walked away from the transitional program on August 24, 2008, and had not contacted his probation officer since that time. He had been terminated from his domestic violence program and he had not completed his volunteer work. Defendant denied the allegations. The court summarily revoked probation and remanded defendant into custody. At the probation violation hearing on September 2, 2008, defendant admitted violating his probation. The court reinstated probation on the original terms and conditions.

On September 25, 2008, the probation officer reported that defendant was attending an outpatient substance abuse treatment program. On September 10, 2008, he was referred for re-enrollment in a domestic violence course, but he had not provided proof of re-enrollment. Neither had he completed his volunteer work. Following a hearing, the court continued defendant on probation on the original terms and conditions.

On October 30, 2008, the probation officer reported that defendant was attending an outpatient substance abuse treatment program and he had restarted his domestic violence program. However, he had not completed his volunteer work and had failed to report to intake appointments on October 23 and 27, 2008, for the ordered transitional substance abuse treatment program. Defendant admitted violating his probation. The court summarily revoked defendant's probation and remanded him into custody. Following a hearing on October 31, 2008, the court reinstated probation on the original terms and conditions.

On November 12, 2008, the probation officer arrested defendant for violating his probation. On November 20, 2008, the probation officer reported that a police report had been filed regarding a domestic violence incident involving defendant and his new girlfriend on November 1, 2008. On November 6, 2008, a San Jose police officer reported that he responded to a call regarding a disturbance on the San Jose City College campus and found defendant with alcohol on his breath, slurred speech, staggered walk, and bloodshot eyes. On November 15, 2008, defendant was terminated from his

domestic violence program. In addition, defendant had failed to complete 20 hours of volunteer work. The court summarily revoked defendant's probation.

The formal probation violation hearing was held February 26, 2009. The probation officer's report for the hearing alleged five circumstances of defendant's violation of his probation: (1) the November 1, 2008 domestic violence incident; (2) the November 6, 2008 San Jose City College incident; (3) defendant's failure to complete, and his November 15, 2008 termination from, his domestic violence program; (4) defendant's failure to complete a substance abuse treatment program; and (5) defendant's failure to complete 20 hours of volunteer work. Attached to the probation officer's report were the police report on the domestic violence incident, a report from defendant's certified domestic violence program, and a treatment status report from his substance abuse treatment program.

Defendant's counsel contended that it was "inappropriate" for the court to find that defendant violated his probation based on the probation officer's report, because the allegations "are all hearsay allegations. They are not based in any way on the personal knowledge of the probation officer who wrote the report." The court stated that it was not going to consider allegations (1) and (2). "What I'm considering is that [defendant] failed to complete domestic violence, he failed to complete a substance abuse program, and he failed to complete 20 hours." "He has [failed] to do anything that I've asked him to do. As a matter of fact, the last time he was in court, he cried, he begged me to give him a second chance. It actually wasn't a second chance; it was about the fifth or sixth chance. And he went out and he failed again. [¶] And so the bottom line is that [defendant] has consistently, consistently not complied with what I have required him to do. [¶] The bottom line is that I've had him for a long period of time. I've given him opportunities. And he's in the position he is right now because of his own conduct."

The court then asked the probation officer to "address the issue of failure to complete a substance abuse program." The probation officer responded that attached to

her report was a report from defendant's substance abuse program counselor dated November 18, 2008. The report states that defendant missed two individual sessions, on October 2 and 23, 2008. Additionally, defendant missed a required group meeting. Defendant objected to "any of this being admitted into evidence on the grounds it does not qualify as reliable hearsay." The court "noted" the objection.

Defendant's counsel contended that, "on the circumstances number 3 and 4 even from the documents that have been provided attached to [the probation officer's] report, it's clear that [defendant] was failed from those programs due to his arrest and the fact that he was in custody." "That doesn't represent any sort of willful failure on the part of the defendant that can be used to violate his probation. [¶] If he had been failed prior to being taken into custody because of his absences, because of his failure to cooperate, I would agree – absent my hearsay objection – I would agree those were grounds." "It's only fair for the court to assume, again, he was failed not by a willful act by him [¶] I don't believe those two things can be the basis for the violation."

The court responded: "They can be, because he was placed on probation on June the 28th of '07, and he was ordered to complete and go to his domestic violence program. He had ample opportunity to do it. And he has failed to complete it. And he has been in and out of this courtroom numerous times because of that failure, and been given opportunities when he was released to go and do it. [¶] And so to say that the only reason he didn't complete it was because he was arrested on – on this one occasion is simply untrue. [¶] He's had numerous months to have completed either at least part of his domestic violence programs or some of his sub – at least complete substance abuse program. And he's failed to do it. He has essentially failed to do anything that this court has required him to do."

Defendant's counsel stated that he "would agree with the court if there had been an actual deadline set for [defendant]." "[T]he court did allow him after his considerable travails to go ahead and enroll, or in some cases to re-enroll, in those programs. [¶] At

the time [defendant] was placed under arrest, he was attending those programs. Again, not perfectly. He may not have been doing the best job, but he was enrolled and attending those programs. I think inherent in that is an acknowledgement by the court that he had more time to complete those programs, otherwise, the court wouldn't have sent him back to that and have him enrolled. [¶] So I don't think that he violated in this way his probation."

The court allowed counsel to address defendant's failure to complete 20 hours of community service. Counsel argued, "I don't believe . . . and, again, I could be wrong, that the court ever made an order that those 20 hours of community service had to be completed by any certain date." "So that I also don't think at this point is a valid basis to find a violation of probation."

The court asked the prosecutor and the probation officer if they wanted to respond. The prosecutor stated that she would submit it on the probation officer's report. The probation officer stated that "defendant would have been terminated from his domestic violence program anyhow based on the report from the police that he was intoxicated on November 12th [sic] when I talked to the police officer. [¶] So besides his excessive absence, he would violate his contract that he signed with New Beginnings he will not be under the . . . influence of controlled substance."

The court stated that it was "taking judicial notice of my file in terms of how many times [defendant has] been violated. [¶] Primarily in addition to . . . diluted tests, lying to the court, giving false address and information after swearing to the court that it was accurate, and he was not lying. And as a matter of fact, he was violated on September 25th for lying, by giving a false address and by also lying about his diluted test which he later, at some point – I don't think he ever admitted that. [¶] But, nevertheless, [defendant] has been given numerous opportunities." "I've had thousands of people that go through this program. And [defendant] is an example of this court's evaluation of the potential of having success on probation is extremely low to nil. So he will be violated."

Defendant's counsel "object[ed] to the court violating [defendant] on any grounds beyond those alleged in . . . the charging document here. He is entitled to notice. I certainly can take the court's ruling strictly ruling on the circumstances in violation that have actually been alleged. But to the extent the court [has] considered anything else, I would object to that." The court responded, "Well, he's got notice now. Address them. And the notice is me saying that he has done nothing I've asked him to do. I've had him as a defendant ever since he's been on probation, so I have a clear idea of what I think his ability is and what his failure to do is. And the court has a right to consider anything in imposing a violation of probation."

Defendant's counsel also objected to the court's consideration of the probation officer's statement that defendant "would have been violated anyway from the batterers' program because of the alleged drinking," "as hearsay, certainly not reliable hearsay." The court stated that it was taking the statement into consideration, "because I think double hearsay is fine."

After hearing counsel's argument for imposition of a sentence of less than three years, the court revoked defendant's probation and committed him to state prison for three years, with 415 days custody credits.

DISCUSSION

Defendant contends that he was deprived of his constitutional right to due process when the court failed to give him written notice of the alleged probation violations and when the court failed to provide him with a written order as to the evidence it relied upon and the specific reasons it found for revoking his probation. He argues that the court denied him written notice of the allegations against him when it "clearly relied upon matters not contained in the petition."

Defendant further contends that the evidence before the trial court did not support the finding that he volitionally failed to comply with the terms of his probation. And, he argues that the court erred by admitting into evidence the documentary material attached

to the probation officer's report, as the documents contained multiple layers of hearsay which rendered the documents unreliable.

“The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation.” (*Black v. Romano* (1985) 471 U.S. 606, 610.) “The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation.” (*Id.* at pp. 611-612; *People v. Arreola* (1994) 7 Cal.4th 1144, 1152-1153.) “The fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred and, if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348; see also *People v. McGavock* (1999) 69 Cal.App.4th 332, 337.)

“[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence.” (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439.) “ ‘ ‘All that is required for the revocation of probation is enough evidence to satisfy the . . . judge that the conduct of the [defendant] has not met the conditions of probation.’ ’ ” (*Id.* at p. 442.) “However, the evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation.” (*People v. Galvan* (2007) 155 Cal. App.4th 978, 982.)

“[T]he right of confrontation at a probation revocation hearing ‘[is] not absolute and where “ ‘appropriate,’ witnesses may give evidence by document, affidavit, or deposition” ’ [Citation.]” (*People v. Arreola, supra*, 7 Cal.4th at p. 1156; *People v. Abrams* (2007) 158 Cal.App.4th 396, 400.) A probation officer's report containing hearsay statements regarding the making and keeping of probation appointments,

restitution and other payments, and similar records of events in the probation officer's records on which the probation officer would rely are properly admitted. (*Abrams*, at p. 405.) Reports documenting the defendant's participation in or absence from ordered counseling sessions are also properly admitted. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066-1067.) On review, we "must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.)

A reporter's transcript of the hearing containing the court's oral statements of the evidence and reasons relied on may serve as a substitute for a written statement. (*People v. Moss* (1989) 213 Cal.App.3d 532, 534.) "If the reporter's transcript of probation revocation proceedings contains a statement of evidence and reasons that permits full appellate review as to the propriety of revocation, it cannot reasonably be said that the absence of a formal written statement has deprived the defendant of due process." (*Ibid.*)

"[A] grant of probation is not a matter of right but an act of clemency, and a decision to revoke probation when the defendant fails to comply with its terms rests within the broad discretion of the trial court." (*People v. Covington* (2000) 82 Cal.App.4th 1263, 1267; see also *In re Coughlin* (1976) 16 Cal.3d 52, 56.) Generally, we review the trial court's order revoking probation for an abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) " 'In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review. [Citations.] 'Further, to be entitled to relief on appeal from an alleged abuse of discretion, it must clearly appear the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.]' ' [Citation.]" (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378.)

In this case, defendant was given written notice of five claimed violations of his probation, and the court stated that it was not going to consider the first two. This left the claims that defendant failed to complete and was terminated from his domestic violence program, that defendant failed to complete a substance abuse treatment program, and that defendant failed to complete 20 hours of volunteer work. The reporter's transcript reflects that, in revoking probation, the court found that defendant had consistently failed to comply with the conditions of probation despite having been given ample opportunities to comply, and as a result his performance on probation was unacceptable.

The reporter's transcript also contains substantial evidence to support the court's finding. Defendant was placed on probation in June 2007. Between that time and the probation violation hearing on February 26, 2009, 20 months later, defendant had failed to complete a substance abuse treatment program, a domestic violence program, and 20 hours of community service. Defendant had plenty of time to complete these conditions of his probation, but he failed to do so and his probation had previously been revoked for his failure to do so. He was attending a substance abuse treatment program and a domestic violence program at the time of his arrest in November 2008, but he had already missed three sessions from his substance abuse treatment program prior to his arrest. His continued abuse of alcohol violated his contract with his domestic violence treatment program, he was arrested due to conduct of his own volition, and thus his termination from his domestic violence program was due to conduct of his own volition. Defendant had not undertaken his ordered 20 hours of community service. And, the court implicitly rejected defendant's claims that the probation officer's documents and testimony in support of the request to revoke probation were not reliable hearsay, and that the failure to set a deadline to complete the probation conditions precluded a finding that defendant had violated them.

On this record, we find that defendant was provided written notice of the alleged probation violations, that he was provided a statement of reasons and evidence to support

the trial court's determination that he violated his probation, and that the evidence supports the trial court's findings. We also find that the trial court's reliance on the probation officer's reports and testimony was proper and not an abuse of discretion. (*People v. Abrams, supra*, 158 Cal.App.4th at p. 400; *People v. O'Connell, supra*, 107 Cal.App.4th at pp. 1066-1067.) Accordingly, defendant has not shown that he was denied due process.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MCADAMS, J.